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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Div. 6

**DEFENDANT'S OBJECTIONS
TO THE STATE'S MOTION FOR
TAKING PHYSICAL EVIDENCE
AND PROPOSED ORDER**

(Oral Argument Requested)

Mr. DeMocker objects to the State's Motion for Taking Physical Evidence and Proposed Order and hereby requests that this Court deny the State's request or, in the alternative, hold a *Frye* hearing on the admissibility of handwriting evidence prior to granting the State's Motion and set conditions on any Order granting the taking of physical evidence. This objection is supported by the following Memorandum.

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2009 OCT 30 AM 10:42

JEANNE INGRAM, CLERK

BY: V. Rose

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Background

The Court set a deadline for the State's disclosure of June 22, 2009. On October 27, 2009, the State filed a Motion for Taking Physical Evidence and Proposed Order. In this Motion the State for the first time identified a previously undisclosed expert, John Hale. The State's motion did not identify what writing Mr. Hale will be comparing to the requested exemplar or how any unresolved handwriting is relevant to the offenses for which Mr. DeMocker is charged.

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ARGUMENT

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1. The State's Request Should Be Denied As Untimely.

This Court set a disclosure deadline for the State of June 22, 2009. The State did not disclose its handwriting expert until the filing of its Motion on October 27, 2009. The State should be prohibited from presenting any testimony from this late disclosed expert. Mr. DeMocker was arrested in October of 2008. The case has been pending for well over a year. The State's Motion provides no rationale for its late disclosure of this expert or request. Pursuant to Arizona Rule of Criminal Procedure 15.7, this Court should deny the State's request for a handwriting exemplar.

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2. The State Is Not Entitled to an Exemplar Under Arizona Rule of Criminal Procedure 15.2(a) Because It Has Not Demonstrated How a Handwriting Exemplar Is "Connected to" the Charged Offense.

The State is only entitled to a handwriting exemplar under Arizona Rule of Criminal Procedure 15.2(a)(7) if it is "in connection with the particular crime with which the defendant is charged." Ariz. R. Crim. P. 15.2(a). The State has failed to demonstrate how the requested handwriting exemplar is related in any way to the crimes for which Mr. DeMocker has been charged. The State has not identified which documents contain handwriting that is in question. Nor has the State explained how any

1 handwriting is even relevant to the charges. In the absence of such a showing, the State
2 is not entitled to disclosure under Rule 15.2(a)(7).
3

4 **3. The Court Should Hold A *Frye* Hearing on the Admissibility of**
5 **Handwriting Evidence Prior to Granting the State's Motion.**

6 Arizona applies the *Frye* standard in ruling on the admissibility of scientific
7 evidence. See *State v. Bible*, 175 Ariz. 549, 580, 858 P.2d 1152, 1183 (1993) (citing
8 *United States v. Frye*, 293 F. 1013 (D.C. Cir. 1923)).¹ Three conditions must be satisfied
9 for the receipt of such evidence. The proponent must first demonstrate that the
10 principles being applied are "generally accepted in the relevant scientific community."
11 *Bible*, 175 Ariz. at 578, 858 P.2d at 1181. The court must also decide the general
12 acceptance of the techniques being used in the application of such principles. *State v.*
13 *Tankersley*, 191 Ariz. 359, 364-65, 956 P.2d 486, 491-92 (1998). Finally there needs to
14 be a foundational showing that correct procedures were followed in a given case. *Bible*,
15 175 Ariz. at 580-81, 858 P.2d at 1183-84.

16 The groundbreaking recent National Academy of Science's Report on Forensic
17 Sciences found that, although "there may be some value in handwriting analysis," "[t]he
18 scientific basis for handwriting comparisons needs to be strengthened." "Strengthening
19 Forensic Science in the United States: A Path Forward."

20 <http://www.nap.edu/catalog/12589.html>, page 166. The National Academy was
21 directed by Congress to undertake the study that led to the report. Scholars from the
22 legal and scientific communities heard evidence from federal agency officials,
23 academics, federal, state and local law enforcement officials, medical examiners, a
24 coroner, crime laboratory officials, independent investigators and defense attorneys,
25 forensic science practitioners and leaders of professional organizations. After over two

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27 ¹ Counsel object to the constitutionality of *Frye* and will file later motions to this effect. Counsel hereby reserves
28 these objections.

1 conviction or exoneration. If juries lose confidence in the reliability of forensic
2 testimony, valid evidence might be discounted, and some innocent persons might be
3 convicted or guilty individuals acquitted.” See “Strengthening Forensic Sciences in the
4 United States,” at 37. The Report contains a series of recommendations including
5 standardized terminology and reporting for forensic science investigations.
6 Significantly, the Report cites a study published in the *Journal of Forensic Sciences*
7 concluding that handwriting experts identify erroneous matches 6.5% of the time. *Id.* at
8 166 n.98.

9 If the Court is inclined to grant the State’s Motion for a handwriting exemplar,
10 Mr. DeMocker requests a hearing pursuant to *Frye* to determine whether expert
11 testimony on handwriting comparisons is admissible under Arizona Rule of Evidence
12 702 and *Frye*.

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14 **4. The Court Should Require the State to Provide the Requested Exemplar**
15 **to the Defense in Advance.**

16 If the Court grants the State’s Motion, over the objections of Mr. DeMocker,
17 Mr. DeMocker requests that the Court order the State to provide defense counsel
18 with the requested exemplar ten days in advance of the proposed date set for the
19 taking of the exemplar. This procedure will prevent a category of potential
20 objections under the Fifth Amendment of the United States Constitution and Article
21 II, Section 10 of the Arizona Constitution.²

22 Constitutional issues may arise due to the nature of the materials to be
23 written as part of the example. At least one district court has held that where the
24 government seeks to compel a suspect to write phrases germane to the prosecution,

25 ² Although the defense acknowledges that *Gilbert v. California*, 388 U.S. 263 (1967) generally held that providing
26 a handwriting exemplar does not violate the constitution, counsel objects that provision of an exemplar does
27 violate the Fifth Amendment’s privilege against self incrimination and notes that in *United States v. Hubbell*, 530
28 U.S. 27, 49 (2000), Justices Thomas and Scalia filed a concurring opinion, indicating that a “substantial body of
evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of
incriminating testimony, but of any incriminating evidence. In a future case, I would be willing to reconsider the
scope and meaning of the Self-Incrimination Clause.”

1 objections under the Fifth Amendment of the United States Constitution and Article
2 II, Section 10 of the Arizona Constitution.²

3 Constitutional issues may arise due to the nature of the materials to be
4 written as part of the example. At least one district court has held that where the
5 government seeks to compel a suspect to write phrases germane to the prosecution,
6 the line is crossed between providing "identification materials" and
7 "communicative materials." *United States v. Green*, 282 F. Supp. 373 (D.C. Ind.
8 1968). In *Green*, the defendant was charged with filing a false and fraudulent
9 claim. The government sought to compel the defendant to write the names written
10 on the credit invoices as part of the conspiracy. The court denied the government's
11 motion, reasoning that requiring the defendant to provide copies of the forged
12 signatures was tantamount to a confession. *Id.* at 374.

13 To avoid these issues, Mr. DeMocker requests that this Court require the
14 State to provide counsel with the requested exemplar ten days in advance of the date
15 scheduled for the exemplar to be taken.

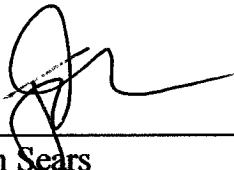
16 CONCLUSION

17 For these reasons Defendant Steven DeMocker, by and through counsel,
18 hereby requests that this Court deny the State's request or, in the alternative, hold a *Frye*
19 hearing on the admissibility of handwriting evidence prior to granting the State's
20 Motion and set conditions on any Order granting the taking of physical evidence.
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24 ² Although the defense acknowledges that *Gilbert v. California*, 388 U.S. 263 (1967) generally held that providing
25 a handwriting exemplar does not violate the Constitution, counsel alleges that provision of an exemplar does
26 violate the Fifth Amendment's privilege against self incrimination and notes that in *United States v. Hubbell*, 530
27 U.S. 27, 49 (2000), Justices Thomas and Scalia filed a concurring opinion, indicating that a "substantial body of
evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of
incriminating testimony, but of any incriminating evidence. In a future case, I would be willing to reconsider the
scope and meaning of the Self-Incrimination Clause."

1 DATED this 30th day of October, 2009.

2
3 By:


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Attorneys for Defendant

10 **ORIGINAL** of the foregoing filed
11 this 30th day of October, 2009, with:

12 Jeanne Hicks
13 Clerk of the Court
14 Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

15 **COPIES** of the foregoing hand delivered this
16 30th day of October, 2009, to:

17 The Hon. Thomas B. Lindberg
18 Judge of the Superior Court
19 Division Six
120 S. Cortez
Prescott, AZ 86303

20 Joseph C. Butner, Esq.
21 Yavapai County Attorney

22 
23 _____
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